

TRANSCRIPT OF PROCEEDINGS

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of:

NFL Enterprises LLC

v

Comcast Cable Communications, LLC

MB Docket No. 08-214

ORIGINAL

DATE OF HEARING: April 13, 2009 VOLUME: 4

PLACE OF HEARING: WASHINGTON, D.C. PAGES: 314-447

NEAL R. GROSS & CO., INC.
1323 RHODE ISLAND AVENUE, NW
WASHINGTON, D.C. 20005
TELEPHONE (202) 234-4433

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

NFL ENTERPRISES LLC, :
Complainant, : MB Docket No.
v. : 08-214
COMCAST CABLE :
COMMUNICATIONS, LLC : File No.
Defendant. : CSR-7876-P

Volume 4

Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554
Hearing Room TW-A363

Monday, April 13, 2009
10:00 a.m.

BEFORE:

RICHARD L. SIPPEL
Chief Administrative Law Judge

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WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

APPEARANCES:

On Behalf of Comcast Cable
Communications, LLC:

MICHAEL P. CARROLL, ESQ.
JENNIFER A. AIN, ESQ.
ARTHUR J. BURKE, ESQ.
ELIZABETH MALASPINA, ESQ.
DAVID TOSCANO, ESQ.

Of: Davis Polk & Wardwell
450 Lexington Avenue
New York, NY 10017
(212) 450-4000
FAX (212) 450-3800

DAVID H. SOLOMON, ESQ.

Of: Wilkinson Barker Knauer, LLP
2300 N Street, NW
Suite 700
Washington, DC 20037
(202) 783-4141
FAX (202) 783-5851

JAMES L. CASSERLY, ESQ.

Of: Willkie Farr & Gallagher LLP
1875 K Street, NW
Washington, DC 20006-1238
(202) 303-1119
FAX (202) 303-2000

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WASHINGTON, D.C. 20005-3701

APPEARANCES: (CONT.)

On Behalf of NFL Enterprises, LLC:

PAUL SCHMIDT, ESQ.
JONATHAN D. BLAKE, ESQ.
GREGG H. LEVY, ESQ.
ROBERT M. SHERMAN, ESQ.

Of: Covington & Burling LLP
1201 Pennsylvania Avenue NW
Washington, DC 20004-2401
(202) 662-5115
FAX (202) 778-5115

On Behalf of the Federal Communications
Commission:

GARY SCHONMAN, ESQ.
Of: Federal Communications Commission
Enforcement Bureau
445 12th Street, SW
Washington, DC 20554
(202) 418-1795
FAX (202) 418-5916

P R O C E E D I N G S

10:09 A.M.

JUDGE SIPPEL: Today, we start the first of three carriage cases: Media Bureau Docket 08-214, the document admission session in the case of NFL Enterprises, LLC versus Comcast Cable Communications, LLC.

Counsel, I understand have given their appearances to the Court Reporter, so in the interest of time, I'm going to just move forward. I'm not trying to slight anybody.

Are there any preliminary matters or any questions anybody wants to raise now before we get into the nitty-gritty?

Okay, hearing none, NFL goes first as it has the burden of proof by the preponderance of the evidence on all issues, as well as the burden of proceeding.

No opening statements are going to be required. It's up to you all, if you want to make them, please make them fairly brief.

And I received, I just want to

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1 note for the record, that I have received --
2 do you want to be called Enterprises, I take
3 it?

4 MR. SCHMIDT: Yes, sir.

5 JUDGE SIPPEL: As opposed to the
6 NFL?

7 MR. SCHMIDT: Yes, sir.

8 JUDGE SIPPEL: If I make a
9 mistake, please understand I'm not trying to
10 cross-current anybody.

11 I have received Enterprises pre-
12 hearing submissions of 6 April and I received
13 both Enterprises and Comcast timely and
14 focused trial briefs which were very helpful.

15 So that being said, Mr. Levy, are
16 you going to be lead today?

17 MR. LEVY: I think Mr. Schmidt,
18 who you have not met before, Paul Schmidt, is
19 going to be lead today.

20 JUDGE SIPPEL: Mr. Schmidt, good
21 morning, sir.

22 MR. SCHMIDT: It's a pleasure to

1 meet you, Your Honor.

2 JUDGE SIPPEL: You may proceed.
3 You're saying that now, but wait until lunch
4 time.

5 MR. SCHMIDT: Fair enough. As we
6 understand, the purpose of today is to go
7 through the parties' exhibits. What we have
8 both done is we have exchanged exhibits on the
9 two sides. We've offered objections to the
10 exhibits and perhaps, not surprisingly, the
11 parties have a broad range of objections to
12 each other's exhibits and what we would submit
13 is the most efficient way to work through that
14 is in many instances we suspect that the
15 objections will on both sides perhaps go away
16 as exhibits are not used, or perhaps go away
17 depending on how they're used.

18 One of the challenges we have in
19 making objections is we don't know how the
20 other side is going to use them and that's
21 true on their side also. So we would propose
22 a process where we have certain core

1 categories of objections that we would like to
2 bring to Your Honor's attention. Comcast may
3 be in the same position.

4 We propose that we go through some
5 of those core categories, rather than going on
6 a document by document basis and preserve the
7 ability to object to specific documents as
8 they come in and we would submit that that
9 would be a much more efficient way of
10 resolving it than going through the roughly
11 nine or ten binders of documents that
12 collectively the parties have identified --

13 JUDGE SIPPEL: So I'm clear, three
14 are yours and the rest are Comcast's.

15 MR. SCHMIDT: Yes, Your Honor.

16 JUDGE SIPPEL: Okay. Who is going
17 to speak for Comcast.

18 MR. CARROLL: Mr. Carroll.

19 JUDGE SIPPEL: Mr. Carroll.

20 MR. CARROLL: Your Honor, good
21 morning. I'll take the lead. I'll be helped,
22 depending on how much detail we get into by

1 some of my colleagues today.

2 JUDGE SIPPEL: All right, well,
3 good morning. Thank you, sir.

4 MR. CARROLL: Thank you. I have
5 no objection to that proposal, if it suits
6 Your Honor's interest here in terms of knowing
7 which exhibits are coming in and which are
8 not. We're happy to proceed in the way Mr.
9 Schmidt proposed or to proceed any way Your
10 Honor would like.

11 JUDGE SIPPEL: Well, I certainly
12 want to do it the most efficient way. On the
13 other hand, we're here to mark -- I mean it's
14 -- it's a God-awful process, but we're here to
15 mark the documents and bring them in, one at
16 a time, all together, one at a time.

17 Okay, why don't you start, Mr.
18 Schmidt?

19 MR. SCHMIDT: Sure, Your Honor.
20 We have probably about four categories of
21 objections that we have. The first category
22 may be the easiest and that's simply, there

1 are a category of documents that Comcast has
2 marked as exhibits that we just don't think
3 are proper subjects of exhibits and those fall
4 into three groupings, roughly.

5 One is deposition transcripts.
6 Comcast has marked -- I don't know if they've
7 marked every deposition. They've marked a
8 number of depositions as exhibits. There was
9 a designation process where we identified
10 specific portions of depositions transcripts
11 that we intended to use. That's incomplete as
12 to certain witnesses by agreement of the
13 parties. And so given that process, we don't
14 think depositions are proper exhibits.
15 Certainly not in their entirety. It probably
16 wouldn't even as to designations. They come
17 in as testimony subject to the objections of
18 the parties and in our view, not otherwise as
19 exhibits which is really getting at something
20 else. So that would be the first in this
21 grouping.

22 The second in this grouping would

1 be trial pleadings. And an example of that
2 that I have in mind is there's an appellate
3 brief that we submitted in the New York
4 Appellate Division case that has been marked
5 as an exhibit. And again, it is unclear to us
6 why a lawyer's brief is an exhibit in this
7 case.

8 JUDGE SIPPEL: Whose brief is it?

9 MR. SCHMIDT: It's ours, Your
10 Honor.

11 JUDGE SIPPEL: Your brief?

12 MR. SCHMIDT: Yes, Your Honor.

13 The third category, again, in this same
14 grouping is articles and treatises. They're
15 oftentimes single pages of economic treatises
16 that in several instances Comcast has marked.
17 There's the Federal Manual on Scientific
18 Evidence that they've marked as an exhibit.
19 Again, I think the rules allow Comcast to use
20 those as learned treatises where appropriate,
21 with either our experts or their experts, but
22 that doesn't mean they get to come in as

1 exhibits. So that would be the first category
2 of items that we would raise, things that
3 there may be some use of them, depositions for
4 impeachment, the treatises, as learned
5 treatises, but they shouldn't, in our view,
6 come in as actual exhibits, certainly not in
7 the form that Comcast has designated them in
8 terms of the depositions, in terms of
9 including everything when we had a specific
10 designation process. And in terms of the
11 treatises, in terms of oftentimes including
12 only a single page.

13 JUDGE SIPPEL: Can they be cited
14 in proposed findings? I meaning assuming that
15 they're not in the record. Can they be cited
16 as a citation?

17 MR. SCHMIDT: I think if they're
18 depositions and they've been properly
19 designated and there's no objection to the
20 designation that's upheld, then I think they
21 can be cited. If they're --

22 JUDGE SIPPEL: I'm talking about

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1 the treatises.

2 MR. SCHMIDT: The treatises, if
3 they're a proper, learned treatise, then the
4 Court can take notice of them absolutely, but
5 that's different than putting them in as an
6 actual exhibit.

7 JUDGE SIPPEL: I'm not even
8 talking about taking notice of them in an
9 evidentiary sense. I'm just saying can you
10 cite it as an authority, assuming that it
11 qualifies.

12 MR. SCHMIDT: Assuming that it
13 qualifies, yes.

14 JUDGE SIPPEL: If they feel that
15 this article qualifies as a learned treatise,
16 that's relevant to the issue, they can cite it
17 and you may comment that it's not relevant,
18 but -- okay, that's all argument.

19 MR. SCHMIDT: Yes.

20 JUDGE SIPPEL: And what's -- just
21 going from last to first, are you finished?
22 Is that the three?

1 MR. SCHMIDT: That's the first --

2 JUDGE SIPPEL: Three categories in
3 your number, in your A objections. Okay.

4 MR. SCHMIDT: Yes, sir.

5 JUDGE SIPPEL: What is the purpose
6 of the objection for the articles and the
7 treatises?

8 MR. SCHMIDT: Oftentimes, they're
9 incomplete. Oftentimes, it's a single page of
10 the treatise. It's hearsay, of course, as
11 evidence. So for those reasons, we think it's
12 improper on an evidentiary basis to have it as
13 an exhibit.

14 There's nothing wrong if used
15 appropriately, if using as a learned treatise
16 with one of the experts, but --

17 JUDGE SIPPEL: Okay, I hear you,
18 but you say that it's basically hearsay --
19 you're objecting because it's hearsay. You're
20 objecting because they're incomplete?

21 MR. SCHMIDT: Yes, sir.

22 JUDGE SIPPEL: Is that the basis

1 for the objection? It's not burdening the
2 record, I mean it's not a -- these things are
3 not so numerous, it's not like a telephone
4 book or something like that?

5 MR. SCHMIDT: It depends on your
6 definition of a telephone book. It's a binder.

7 JUDGE SIPPEL: Roughly, how many
8 of them are there?

9 MR. SCHMIDT: In terms of the
10 articles, I counted one, two, three, four,
11 five, six, seven, eight, nine, ten, eleven,
12 twelve -- there's about thirteen of the
13 articles.

14 JUDGE SIPPEL: Excerpted articles?

15 MR. SCHMIDT: Excerpted.

16 JUDGE SIPPEL: Then that's it?

17 MR. SCHMIDT: Yes. The other
18 thing I'm saying, Your Honor, is we don't
19 know, of course, and this is one of the
20 challenges that the parties have. We don't
21 know how they intend to use them. We may have
22 objections to the fairness of using a single

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1 page of these publications as evidence when we
2 don't know yet how they intend to use that.

3 JUDGE SIPPEL: Do you honestly
4 believe that I would be misled by that?

5 MR. SCHMIDT: I would not say
6 that.

7 JUDGE SIPPEL: I mean after you've
8 had your opportunity. obviously, to dissect
9 and whatever else you would want to do with
10 it.

11 MR. SCHMIDT: But it goes to
12 whether it's fair for them to use it as an
13 exhibit. It's our position that particularly
14 not knowing how they intend to use it, it
15 shouldn't come in as an exhibit. It should be
16 impeachment or a learned treatise.

17 JUDGE SIPPEL: I can ask for a
18 brief proffer, but I'm trying to get at the
19 point of your -- just what you're objecting
20 to. If this were a jury situation, it might
21 confuse, it might prejudice the jury. Could
22 do lots of things to a jury, but I don't I'm

1 going to be bothered. There's basically 13
2 pieces of paper that I may not really pay any
3 attention to until it's fully briefed.

4 I'm trying to find out where the
5 prejudice really is.

6 Okay, can I have a little bit of a
7 proffer on that?

8 What are you going to use these
9 things for?

10 Specifically, we're talking about
11 the excerpts of the treatise articles.

12 MR. CARROLL: I'm with you.
13 Crossing their expert and for use with our
14 expert. We have several experts on each side.
15 And we're not seeking to have them admitted
16 unless they're used with the experts. Their
17 expert is purporting to cite economics
18 literature himself. I have no objection to
19 any of the treatises he wants to cite. But I
20 don't want to have my hands tied and so I want
21 to be able to cross their expert and our
22 expert in turn also wants to be able to cite

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1 some materials.

2 I don't see a need to have
3 treatises just sitting in the record that
4 aren't attached to some witness. So we've
5 attempted to give the Court a sense for the
6 ones that we can identify now before we see
7 their case come in. If the objection is we
8 have a single page, and they'd rather have the
9 whole treatise in, I wouldn't have thought
10 that given all the binders we already have,
11 but I have no objection putting the treatise
12 in in its entirety.

13 There's no attempt to be confusing
14 or anything about it. That's the purpose for
15 it.

16 And there are some economic debates that are
17 going to come up as Your Honor will see, if
18 you haven't seen already in the pretrial
19 submissions here between the experts.

20 JUDGE SIPPEL: There's no way you
21 can use economists for that debate?

22 MR. CARROLL: No. I'm not sure

1 we're going to resolve it with them either.

2 JUDGE SIPPEL: All right, let me
3 say this, just as a brief comment. It seems to
4 me that what Comcast has done to you really is
5 lay it out for your experts as what they might
6 expert. I mean this is like giving your
7 battle plan in advance of the battle. I don't
8 see any prejudice at all. In fact, I think
9 you're helped. I wouldn't do it, if I was
10 going to use it on cross examination, but then
11 again, I'm a neutral.

12 Okay, so that's denied. That
13 motion is denied or the objection is denied.
14 You can keep the treatise pages the way they
15 are. If somebody wants to move to strike at
16 the end of the testimony because they haven't
17 been used, that's fine, too, but either way.
18 It's not going to burden the record. I think
19 I can deal with those things.

20 But I really don't pay much
21 attention in the final analysis from one sheet
22 from a treatise as far as making any kind of

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1 conclusion or anything in the final decision-
2 making process.

3 Okay, now we're back to the trial,
4 the trial pleadings. This is only one
5 pleading and an Enterprise brief? Is that
6 right? I'm familiar with the case up there.
7 And it's just a brief.

8 MR. SCHMIDT: Yes.

9 JUDGE SIPPEL: All right, can I
10 have an argument on that?

11 MR. CARROLL: It's an admission.
12 And Your Honor may remember, we have an
13 estoppel motion in front of Your Honor
14 regardless of how Your Honor rules on that
15 estoppel motion which is fully briefed. A big
16 part of the dispute that you can probably
17 glean from the trial briefs you've seen
18 already and it's coming this week is that the
19 NFL has taken a very inconsistent position
20 here with positions they've taken previously
21 as to the nature of distribution that they
22 wanted.

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1 So for example, we now understand
2 in this proceeding they're asking Your Honor
3 for, among other things, an order that we give
4 them analog distribution. In the New York
5 proceeding, they sued to enforce a contract
6 with us and sought digital distribution at a
7 D2 level. And I've got that in Court
8 pleadings.

9 Court pleadings in at least the
10 Federal Courts and State Courts where I
11 frankly, and I have to admit this to Your
12 Honor where I practice much more than in front
13 of the FCC, that's as good as you get on a
14 part admission. An actual filing, by the
15 party, through is lawyer in a courtroom. It's
16 gold-plated. And we intend to make quite a
17 bit of use out of that and that is also why,
18 Your Honor, we separately gave you a five to
19 ten page brief on this estoppel issue to sort
20 of preview this issue so you could see it.

21 I would also note that on their
22 side, the irony is they're seeking to use

1 pleadings in cases that have nothing to do
2 with us directly. They're not even our
3 pleadings. So it's hard for me to understand
4 why they would have an objection to a pleading
5 that is their own pleading. But that's our
6 objection. That's our response to that
7 objection.

8 JUDGE SIPPEL: All right.

9 MR. SCHMIDT: And Your Honor,
10 hearing that, we don't have any dispute, I
11 think, with Comcast about what the facts are
12 in the New York litigation, what the relief
13 we're seeking in the New York litigation is.
14 And so if that's the purpose for which Mr.
15 Carroll is going to use it, we'll withdraw our
16 objection.

17 JUDGE SIPPEL: Thank you.

18 MR. SCHMIDT: I don't think it's
19 disputed that in the New York litigation we
20 seek to enforce a --

21 JUDGE SIPPEL: Thank you, that's
22 enough. That's all I have to hear. Perfect.

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1 All right, so that becomes the
2 objection as to the pleading in the New York
3 Appellate Division case is now moot. And so
4 we've gone -- we've ruled on two of three.

5 The last is the deposition
6 transcripts. As I understand it, you've got
7 objection to a generic kind of use of them
8 that there has been, what I would call the
9 traditional pretrial usage in the sense that
10 you confer with one another and you meant to
11 use deposition A for this purpose and they
12 want to get excerpts into their purpose and as
13 opposed to just, in effect, just bringing them
14 all in.

15 MR. SCHMIDT: Yes.

16 JUDGE SIPPEL: Okay, let me ask
17 Comcast what their position is on that.

18 MR. CARROLL: We can dispense with
19 this one very quickly. You'll be happy to
20 know.

21 JUDGE SIPPEL: Thank you.

22 MR. CARROLL: We're only seeking,

1 in evidence, the excerpts that we have
2 designated. We gave Your Honor complete
3 copies in the exhibit binders in case you
4 needed to refer to the complete copies.

5 We are not seeking admission of
6 the complete copies as such. They're there
7 only in case in the course of fighting over
8 the designations and counter-designations,
9 Your Honor may have found it helpful to say
10 well, let me see the whole transcript. We've
11 given you the whole transcript.

12 That's the only reason they're
13 there. The only thing I am actually putting
14 into evidence are the excerpts we have
15 designated from the depositions.

16 JUDGE SIPPEL: And Enterprises
17 knows exactly what == right now, they know
18 exactly what excerpts you're talking about?

19 MR. CARROLL: Oh yes, we've given
20 them designations. We have counter, counter,
21 counter designations for these depositions and
22 they know, which witnesses we've designated.

1 They know which lines on which page.

2 But it occurred to us, well,
3 rather than Your Honor just having lines on
4 pages selectively, shouldn't we have a
5 repository somewhere of the full depositions
6 in case you needed to reference them to make
7 determinations.

8 JUDGE SIPPEL: I understand.

9 MR. CARROLL: We're not seeking to
10 introduce the full depositions.

11 JUDGE SIPPEL: I understand. The
12 way to do that is just send me over copies of
13 the deposition and include only what -- the
14 thing is it makes just the whole thing kind of
15 cumbersome.

16 MR. CARROLL: Our apologies if we
17 created an issue. We didn't intend to.

18 JUDGE SIPPEL: I'm not saying it's
19 an issue. I'm just saying as a practical --
20 when you have to lift this stuff, you start to
21 think very practically, even if it's just off
22 the shelf on to your desk.

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